FILED

0014 APR 27 2000

OFFICE OF THE CLERK

No:

IN THE
**SUPREME COURT OF THE UNITED STATES**

FRED T. PENO and PATRICIA L. PENO,
*Petitioners*

v.

STATE FARM FIRE AND CASUALTY COMPANY;
STATE FARM INSURANCE COMPANIES;
a/k/a State Farm Insurance,
*Respondent*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

# PETITION FOR WRIT OF CERTIORARI

**LEE H. ROBERTS**
**ROBERTS, MICELI & BOILEAU**
**146 EAST WATER STREET**
**LOCK HAVEN, PA 17745**
**(570) 748-4059**
**Counsel of Record for Petitioners**
**Pa. I.D.# 10032**

47pp

## QUESTIONS PRESENTED

1. Is an insurer estopped from asserting a one (1) year contractual limitation-of-suit provision contained in a fire policy where the insurer has previously taken the position that the policy is void and the insurer actively pursues a criminal prosecution against its insureds?

2. Is an insurer estopped to assert a one (1) year contractual limitation-of-suit provision where the insurer by making substantial payments under the policy induces the insured to withhold filing suit?

## TABLE OF CONTENTS


| Section | Page |
|---|---|
| Table of Citations and Statutes | ii |
| Citations to Opinions Below | 1 |
| Statement of Jurisdiction | 2 |
| Statutes Involved in the Case | 3 |
| Statement of the Case | 6 |
| Argument | 9 |
| Appendix | 16 |

## TABLE OF CITATIONS

### FEDERAL CASES

Avila Group, Inc. v. Norma J. of California, 426 F. Supp. 537, 542 (S.D.N.Y. 1977) ---- 9
Hospital Support Services, Ltd. v. Kemper Group, Inc., 889 F.2d 1311 (3d Cir. 1989) ---- 13
Interpace Corp. v. Pennbrook Hauling Co., 389 F. Supp. 560, 564 (M.D. Pa. 1975) ---- 9
Leone v. The Aetna Casualty and Surety Co., 599 F.2d 566 (3d Cir. 1979) ---- 10
Marshall v. Aetna Casualty and Surety Co., 643 F.2d 151 (3d Cir. 1981) -- 9
Shugrue v. Ins. Co. of State of Pennsylvania, 180 B.R. 53, 56 (S.D.N.Y. 1995) ---- 9

### STATE CASES

Abolin v. Farmer's American Mut. Ins. Co., 100 Pa. Super. 433 (1930) --- 12
Brakeman v. Potomac Ins. Co., 472 Pa. 66, 371 A.2d 193 (1977) ---- 14
Brooks v. St. Paul Ins. Co., 264 Pa. Super. 157, 399 A.2d 714, (Pa. Super. 1979) ---- 13
Diamon v. Penn Mutual Fire Ins. Co., 247 Pa. Super. 534, 372 A.2d 1218 (1977) ---- 10, 11
Estate of Brojack, 467 A.2d 1175, 1181 (Pa. Super. Ct. 1983) ---- 9
Samuels v. Blue Cross and Blue Shield, 405 Pa. Super. 476, 592 A.2d 1310 (Pa. Super. 1991) ---- 14, 15
Terpeluk v. Insurance Co. of North America, 189 Pa. Super. 259, 150 A.2d 558 (1959) ---- 13

### FEDERAL STATUTES

28 U.S.C. § 1254(1) ---- 2
28 U.S.C. 1331 ---- 8
28 U.S.C. 1441 ---- 8

## CITATIONS TO OPINIONS OF COURTS BELOW

No citations to the official or unofficial reports of the opinions entered in the case by lower courts are available because the case was disposed of by memorandum opinions. The applicable memorandum opinions are attached in the appendix hereto.

## STATEMENT OF JURISDICTION

By Order dated December 29, 1999, The United States Court of Appeals for the Third Circuit affirmed the District Court's grant of Summary Judgment in favor of Appellee, State Farm Insurance Companies.

Appellants, Fred and Patricia Peno, thereafter filed a timely Petition for Rehearing pursuant to Fed. R. App. P. 40. Appellants' Petition for Rehearing was denied by Order dated January 28, 2000.

Jurisdiction in this Honorable Court is predicated upon 28 U.S.C. § 1254(1).

## STATUTES INVOLVED IN THE CASE

40 P.S. § 636(1), (2)(1999)

Fire insurance contract; standard policy provisions; permissible variations

1. As used in this section, the term "fire insurance" shall mean insurance against loss by fire, lightning or removal, as specified in paragraph (1) of subsection (b) of section 202 of this act, as amended, and the term shall not include insurances of the kind specified in any other portion of that section, amended as aforesaid, whether or not the risks of fire, lightning or removal be included.

2. Except as provided elsewhere in this section, no insurance company, association or exchange shall issue a policy affording fire insurance, as defined in this section, on property in this Commonwealth, unless such policy contains the following provisions as to such insurance:

* * * *

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

* * * *

There may be printed upon the face of a policy which contains such provisions the words "Standard Fire Insurance Policy of the State of Pennsylvania" and including the name of any other states which adopt this form of policy.

40 P.S. §1610.3 (1999)

Disclosure of information

(A) FIRE LOSS INFORMATION. --Any authorized agency may, in writing, require any insurance company at interest to release to the requesting authorized agency any or all relevant information or evidence deemed important to the authorized agency which the insurance company may have in its possession relating to a fire loss

under investigation by the authorized agency. Relevant information may include, without limitation herein:

(1) pertinent policy information relevant to a fire loss under investigation, including any application for such a policy;

(2) underwriting information or risk inspection reports;

(3) policy premium payment records which are available;

(4) history of previous claims made by the insured; and

(5) material relating to the investigation of the loss, including statements of any person, proof of loss, and any other information relevant to the investigation by the authorized agency.

(B) NOTIFICATION FOR INVESTIGATION:

(1) Whenever the investigation of a fire loss by an insurance company insuring the loss indicates that the probable cause of the fire loss was arson, then the company shall notify, in writing, the appropriate authorized agency and upon the request of any authorized agency, shall provide the requesting authorized agency with such fire loss information developed from the company's inquiry into the fire loss as may be requested by the authorized agency and the insurance company may provide to any authorized agency any information it may have relating to a fire loss;

(2) Nothing in this subsection shall abrogate or impair any rights or duties created under subsection (a).

(C) NOTIFICATION TO POLICYHOLDER. --When information is given by any insurance company to an authorized agency pursuant to subsection (a) or (b):

(1) The insurance company shall send written notice to the policyholder or policyholders about whom the information pertains, except if the insurance company receives notice that the authorized agency finds, based on specific facts, that there is reason to believe that such information will result in:

(i) Endangerment to the life or physical safety of any person.

(ii) Flight from prosecution.

(iii) Destruction of or tampering with evidence.

(iv) Intimidation of any potential witness or witnesses.

(v) Obstruction of or seriously jeopardizing an investigation.

(2) The insurance company shall send written notice not sooner than 45 nor more than 60 days from the time the information is furnished to an authorized agency except when the authorized agency specifies that a notice should not be sent in accordance with the exceptions enumerated under paragraph (1) in which event the insurance company shall send written notice to the policyholder not sooner than 180 days nor more than 190 days following the date such information is furnished to an authorized agency.

(3) Every insurance company or authorized agency and any person acting on behalf of an insurance company or authorized agency complying with or attempting in good faith to comply with paragraphs (1) and (2) shall be absolutely immune from any civil liability arising out of any acts or omissions in so doing.

(4) Nothing in this subsection shall be construed to create any rights to privacy or causes of action on behalf of policyholders which are not in existence as of the effective date of this act.

(D) RELEASE OF INFORMATION. --An authorized agency that is provided with information pursuant to subsection (a) or (b) may, at its discretion, in good faith, release or provide orally or in writing such information that it may possess in whole or in part to any other authorized agency or insurance company in furtherance of the authorized agency's own investigative purposes.

## STATEMENT OF THE CASE

On June 30, 1995, State Farm Insurance Company issued a fire insurance policy on the residence of Fred and Patricia Peno in Coudersport, Pennsylvania, which was in effect on January 9, 1996. On January 9, 1996, a fire totally destroyed the Peno residence. The Peno's personal copies of their policy were destroyed in the fire.

The policy issued to the Penos contained the following provisions:

> 8. **Suit Against Us**. No action shall be brought unless there has been compliance with the policy provisions. The action must be started within one (1) year after the date of loss or damage.
>
> 14. **Intentional Acts**. If you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and we will not pay you or any other insured for this loss.

Notably, the language does not say that "coverage" is void or that "benefits under the policy" are void, it states "this policy is void". Black's Law Dictionary, 6th Ed., defines "void" as "that which has no force and effect, is without legal efficacy, is incapable of being enforced by law or has no legal or binding force."

By letter dated December 12, 1996, State Farm denied the Penos' claim alleging the intentional ignition of the fire and intentional misrepresentations made by the Penos to State Farm. State Farm thereby invoked the Intentional Acts provision which purported to render the policy, including the one (1) year limitation-of-suit provision void.

On the evening of the fire, a State Farm representative presented a check for two thousand dollars ($2,000.00) to Mr. and Mrs. Peno and thereafter provided the Penos with additional living expenses ("ALE") as provided in the subject insurance policy. On January 11, 1996, the Pennsylvania State Police and an independent investigator for State Farm, conducted an investigation and an inspection of the premises. The police report stated that the fire was

of "undetermined" origin. The State Farm investigator determined that the fire was of "incendiary" origin.

Although the point of origin of the fire was the second floor, southwest corner of the structure, the State Farm investigator took a wood sample from the supporting beam of the center stairwell. The Pennsylvania State Police did not suspect anything unusual at the supporting beam of the center stairwell. The aforementioned sample was sent to an expert hired on behalf of State Farm, and was determined to be positive for gasoline.

The Pennsylvania State Police sent State Farm a letter on February 21, 1996 advising State Farm of its obligation to provide the State Police with any relevant policy information or other information relating to the fire loss, in accordance with the Pennsylvania Arson Reporting Immunity Act. Thereafter, State Police investigators met with State Farm representatives on June 5, 1996 at Coudersport, for the purpose of reviewing the incident report and exchanging information. After the meeting, the suspected origin of the subject fire was changed from "undetermined" to "arson". State Farm furnished the Pennsylvania State Police with 26 negatives of photos which were taken of the scene of the fire by a neighbor. In addition to the photo negatives that were supplied, State Farm supplied 23 additional items to the state police including, but not limited to, a laboratory analysis, a transcript of an interview with Fred Peno by State Farm, a confidential internal memo, a confidential investigation report prepared for State Farm, numerous financial documents concerning the Penos and various other documents.

On July 18, 1996, pursuant to the provisions of the Arson Immunity Reporting Act, a meeting took place in Coudersport with the Potter County District Attorney and representatives of State Farm as well as the state police. As a result of this meeting, Fred Peno was charged with criminal arson. On or about October 18, 1996, criminal charges of arson were filed against Fred Peno. A jury trial occurred from September 22 through September 26, 1997 and Fred Peno was acquitted of all charges.

During Mr. Peno's arson trial, the District Attorney attempted to compel Fred Peno to deliver a circuit breaker panel box from the residence and in his attorney's possession for further inspection and the trial court ruled that this was not required. Fred Peno's expert confirmed that a defect in this circuit breaker panel box was the cause of the fire in the Southwest portion of the residence.

On October 31, 1996, a copy of the insurance policy was requested from State Farm. On November 6, 1996, a copy of the insurance policy was once again requested from State Farm. On November 11, 1996, yet another request was made to State Farm. By

letter dated November 15, 1996, the Penos received a copy of the residence fire insurance policy without the declaration sheet stating the actual coverage. On November 19, 1996, a request was made for the declaration sheet. In the letter of December 12, 1996 alleging that Mr. Peno intentionally ignited the fire, a copy of a generic policy [Form 5] was received with a statement from State Farm's attorney, "I will have to confirm that this is the actual policy issued to Mr. and Mrs. Peno. I will also have to make sure there are no endorsements to this policy. I will confirm each of these things." The declaration sheet was not included in the letter of December 12, 1996 with the policy. On January 8, 1997, the day the one (1) year limitation-of-suit period lapsed, a copy of the declaration sheet for the fire insurance policy was received for the first time by Plaintiffs' counsel.

Following Fred Peno's acquittal on September 26, 1997, a letter was sent on October 13, 1997 to State Farm proposing a settlement. A second letter was sent on October 21, 1997. On October 27, 1997, a letter was received from Brad Charles acknowledging the acquittal of Fred Peno and a denial of coverage.

The Penos filed suit against State Farm in state court on November 12, 1997. State Farm removed the case to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. 1441 based upon diversity of citizenship of the parties, 28 U.S.C. 1331.

## ARGUMENT

**Is an insurer estopped from asserting a one (1) year contractual limitation-of-suit provision contained in a fire policy where the insurer has previously taken the position that the policy is void and the insurer actively pursues a criminal prosecution against its insureds?**

In its letter of December 12, 1996, State Farm denied the Peno's claim for fire coverage alleging that Fred Peno intentionally ignited the fire and made intentional misrepresentations to State Farm. Under the terms of the contract policy, State Farm by invoking the Intentional Acts provision purported to render the policy void. Now, having denied payment on the policy because it was "void", State Farm wishes to reinstate the one (1) year limitation-of-suit provision as a defense to the Peno's claim. Where the one (1) year contractual limitation of suit provision is not applicable, the six (6) year statute of limitations found in 42 Pa.C.S.A. § 5527 applies to the fire policy. Marshall v. Aetna Casualty and Surety Co., 643 F.2d 151 (3d Cir. 1981).

Well-settled principles of estoppel prohibit a party from seeking the benefits of a contract while disaffirming its burdens. Shugrue v. Ins. Co. of State of Pennsylvania, 180 B.R. 53, 56 (S.D.N.Y. 1995); Estate of Brojack, 467 A.2d 1175, 1181 (Pa. Super. Ct. 1983)(party receiving the benefits of an agreement cannot object to its executory provisions); Avila Group, Inc. v. Norma J. of California, 426 F. Supp. 537, 542 (S.D.N.Y. 1977)(party cannot assert the existence of valid contract in suit for damages and simultaneously assert that no contract exists to avoid arbitration); Interpace Corp. v. Pennbrook Hauling Co., 389 F. Supp. 560, 564 (M.D. Pa. 1975)(party cannot assert validity of a contract yet avoid its limitations).

State Farm's twin arguments, that the policy is void due to Fred Peno's intentional act and that suit on the policy is barred by the contractual limitation-of-suit provision, place State Farm in the peculiar position of simultaneously attacking and affirming the validity of the same contract. State Farm wishes to disaffirm its burdens under the contract yet still claim the benefit of a contractual limitation-of-suit provision. Such a position is untenable.

If an insurer engages in conduct which leads to the arrest of an insured, or negligently conducts an investigation which leads to the arrest of an insured, there is a tolling of the limitation in the contract until a conclusion of the criminal case. Diamon v. Penn

Mutual Fire Ins. Co., 247 Pa. Super. 534, 372 A.2d 1218 (1977), adopted by the Third Circuit in Leone v. The Aetna Casualty and Surety Co., 599 F.2d 566 (3d Cir. 1979). In Diamon, the Court suspended the one (1) year contractual limitation of suit clause in the contract during the criminal process. This result is unaffected by the 1980 Arson Reporting Immunity Act 40 P.S. 1610.1, et seq. because the Act does not in any way affect the limitations-of-suit provision or prior law but rather simply immunizes insurance companies from punitive damages for cooperating with authorities.

The facts in Diamon are that Mr. Diamon purchased a fire insurance policy on December 4, 1967, which had a twelve month limitation of action clause identical to the current contract. On April 9, 1968, while he was in Florida, his home, garage and furniture were destroyed by fire. In July 1968, a sworn proof of loss was filed claiming $20,000.00 for the home, $250.00 for the garage, and $8,000.00 for furniture loss and $4,000.00 for additional living expenses. On September 17, 1968, after an investigation by an adjuster, the insurance carrier rejected the proof of loss and refused to pay the claim. On this same date, the District Attorney of Crawford County filed a criminal complaint against Mr. Diamon charging him with the filing of a false proof of loss. It was alleged that he had removed the furniture from his home before the fire. On January 28, 1969, he was indicted for cheating by false pretenses. On February 11, 1969, a jury found him guilty of the charge. [Mr. Peno was found innocent.] This miscarriage of justice became apparent when Mr. Diamon secured a bulldozer and dug up rubble at the site of his former home, uncovering pieces of the furniture for the claimed loss. On the basis of this after-discovered evidence, the Trial Court, on March 2, 1970, granted a new trial. On December 21, 1970, the District Attorney nolle prosequi the case. On April 5, 1974, Mr. Diamon filed a civil suit to recover damages. Failure to file suit within twelve months was raised by the defendant insurer in a motion for summary judgment. This was granted to the insurance carrier.

The Lower Court indicated that the issue was whether the twelve month limitations clause was waived by the agent for causing criminal charges to be filed by the County Detective or was a complete waiver – not a postponement – so that Mr. Diamon could bring suit within the general six-year statute of limitations. The Superior Court reversed the findings. It held that Mr. Diamon was "forced by the circumstances" to wait out the five-year statute of limitations applicable to the criminal charge before he brought suit against the company. Since he could still be reprosecuted on the charges until July 22, 1973, if he filed a civil action under the policy,

he ran the risk that the company would retaliate by refiling the criminal charges.

Justice Spaeth held that it is established that the utmost fair dealings should characterize the transactions between an insurance company and the insured. In analyzing the cases, the Court stated at 372 A.2d 1218, 1221 the following:

> Reflection upon the cases will show that when the problem arises, whether an insurer is estopped from enforcing, or will be regarded as having waived its right to enforce, the limitation clause, two questions must be answered: Did the insurer take some action that suspended the clause; and if it did, so that suspension occurred, did something happen to start the clause running again?

The Court went on to state at 1223 the following:

> So here, appellee's [insurance company] assertion that appellant [plaintiff], William Diamon, was criminally responsible has turned out to be without foundation. When appellee [insurance company] made its mistake and charged against him, the rights of the parties were fixed, which is to say, the limitation clause was suspended. To hold that it was not would be to enable appellee [insurance company] to benefit from its own mistake.

The Court concluded on page 1222 that it was apparent that if the company told the insured that it had decided to have him arrested, and if in fact as here (he had been arrested), there was an "inducement to withhold bringing suit" as would have suspended the limitation clause.

The case of Leone v. Aetna Casualty Ins. Co., supra, involved fire damage which occurred on May 15, 1976. Aetna was notified on June 22, 1976 and denied the claim on November 30, 1976. Suit was filed on November 16, 1977, outside the one (1) year statute of limitations. Summary judgment was granted and reversed by the Third Circuit. The Court stated the following at page 567:

> The question arises, whether under Diamon, an insurer's good faith, but erroneous charge of criminal conduct will suffice to toll the limitations when there is no initiation of a criminal proceeding. On this issue, we come to the conclusion that a good faith charge of criminal conduct will not toll the limitation unless a

criminal action is begun. We base this upon the Diamon Court's handling of Abolin v. Farmer's American Mut. Ins. Co., 100 Pa. Super. 433 (1930) ...

> In light of the Diamon Court's treatment of Abolin, we believe that it is the law of Pennsylvania that a mere accusation of criminal conduct by an insurer against its insured, made in good faith, and with no steps taken by the insurer toward criminal prosecution, does not effect a tolling or suspension of the suit limitation clause. (Emphasis added)

The Court went on to quote Diamon and Abolin on page 567:

> It is apparent from this statement that if the company had told the insured that it had decided to have him arrested, and if in fact (as here) he had been arrested, there would have been such an "inducement to withhold bringing suit" as would have suspended the limitations clause.

Finally, the Court held on page 568 the following:

> The Diamon Court adopted a rule that an insurer's bad faith accusation of criminal conduct on the part of an insured, or such an allegation engendered by a negligently conducted investigation, would toll the suit limitation clause. We believe that the contentions of paragraph 12 of plaintiff's complaint, given the required legal reading, would be sufficient at a trial to place at issue the good faith of Aetna's assertion of criminal conduct as well as the question of whether that accusation, if false, resulted from an improperly conducted investigation. (Emphasis added)

Where the acts or conduct of the insurance company and the duly authorized representative have been such as to estop an insurance company from strictly enforcing the limitation clause described in the policy, resulting in its suspension, postponement, or extension, the clause begins to run again when the company definitely announces its refusal to pay under the limitation clause and the insured, who is in full possession of the facts, must bring his or her action within a reasonable time thereafter, not exceeding twelve

months following such refusal. Terpeluk v. Insurance Co. of North America, 189 Pa. Super. 259, 150 A.2d 558 (1959). Various legal precedents have established a principle that the one (1) year contractual limitation is enforceable, but that it may be avoided, waived, or suspended, if the insurance company does things which induce the insured to delay filing suit. This should be determined by the fact finder. Brakeman v. Potomac Ins. Co., 472 Pa. 66, 371 A.2d 193 (1977)

Hospital Support Services, Ltd. v. Kemper Group, Inc., 889 F.2d 1311 (3d Cir. 1989) is also instructive. In Hospital Support, there was no fire damage or criminal prosecution involved. The case involved four (4) failed x-ray tubes in mobile CAT scan equipment and a claim for the damage in the amount of thirty-five thousand dollars ($35,000.00). The Hospital did not file a sworn proof of loss within ninety (90) days and did not file suit within one (1) year. Summary judgment was granted by the District Court and upheld by the Third Circuit. This Court refused to require the insurance company to show that they had received some type of prejudice as required in Brakeman v. Potomac Ins. Co., 472 Pa. 66, 371 A.2d 193 (1977). The Court concluded that Brakeman only applied to the notice provisions and not to the limitation provisions. Hospital Support Services, Ltd. did not allege any conduct on the part of the insurance company which induced it to wait to commence suit, such as a negligently conducted investigation. They offered no extentuating circumstances and there was no claim of any criminal conduct on the part of the insured. Thus, the facts in Hospital are totally different than the Peno case.

**Is an insurer estopped to assert a one (1) year contractual limitation-of-suit provision where the insurer by making substantial payments under the policy induces the insured to withhold filing suit?**

If an insurer provides benefits under an insurance policy and later retracts payment, any contractual claim limitation is tolled until the date of retraction. Samuels v. Blue Cross and Blue Shield, 405 Pa. Super. 476, 592 A.2d 1310 (Pa. Super. 1991).

In Samuels, the insured incurred both outpatient and inpatient medical bills at Hahnnemann University Hospital during the period of March 2, 1986 through April 2, 1987 These bills were paid by Blue Cross and Blue Shield respectively. On June 17, 1987, both Blue Cross and Blue Shield retracted their payments since Medicare had also paid the bills. Samuels filed suit on August 8, 1988, outside of the two (2) year limitations period in the Blue Cross

contract and outside of the one (1) year limitations period in the Blue Shield contract. The Court held at 592 A.2d 1310, 1312 the following:

> Nevertheless, an insurer can, in effect, toll his contractually imposed limitations period, if, by its actions, [it] induces an insured to forebear bringing suit within the prescribed period. Citing cases ...

Having induced Samuels to forebear bringing suit within the prescribed period, the insurers cannot now raise the contractual limitation as a defense. We hold that where an insurer provides benefits and later retracts payment, any contractual time limitation is tolled until the date of retraction.

Blue Cross and Blue Shield also used a claims appeal procedure to resolve disputes over payments. Invoking this procedure also caused Samuels to be outside of the limitations clause of the contracts. The Court held at 592 A.2d 1310, 1313 that:

> It is a given that the insurer drafts the contract containing both the time limitation clause and the claim appeal procedure. The insurer is "the house" in the insurance game. We will not allow them to stack the deck by interpreting the interplay of these clauses as the insurers request today. We hold that where an insured voluntarily enters into a claim appeal procedure provided by the insurer, any time limitation contained within the insurance contract is tolled until that appeal procedure is concluded.

Thus, by making payments to Mr. and Mrs. Peno, under the insurance policy, to December 31, 1996, the limitations clause was tolled from the day of the fire to December 31, 1996 and did not start to run again until January 1, 1997. Suit was filed on November 12, 1997, well within one (1) year of the commencement of the limitations clause.

The Penos had every reason to believe that when they were continuing to receive payments from State Farm that State Farm was going to pay the claim until December 12, 1996, when they specifically rejected it. The contractual limitation of suit provision should have been tolled during the time of these payments.

ROBERTS, MICELI & BOILEAU

4/27/00
Date

BY: Lee H Roberts
LEE H. ROBERTS, ESQUIRE
Attorney for Petitioner
146 East Water Street
Lock Haven, PA 17745
(570) 748-4059
I.D. #10032

UNREPORTED – NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 98-7605

FRED T. PENO; PATRICIA L. PENO,
Appellants
v.

STATE FARM FIRE AND CASUALTY CO.;
STATE FARM INSURANCE COMPANIES,
a/k/a State Farm Insurance,

Appeal from the United States District Court
For the Middle District of Pennsylvania
D.C. Nos.: 97-cv-1859
District Judge: Honorable James F. McClure, Jr.

Before: NYGAARD, RENDELL, and ROSENN, Circuit Judges.
Argued December 8, 1999
(Filed December 29, 1999)

Lee H. Roberts (Argued)
Roberts & Miceli
146 East Water Street
Lock Haven, PA 17745
Counsel for Appellants

Lee E. Ullman (Argued)
Forry, Ullman, Ullman & Forry
100 Kachel Boulevard
Green Hills Corporate Center, Suite 20OW
Reading, PA 19607
Counsel for Appellees

## MEMORANDUM OPINION

ROSENN, Circuit Judge.

This appeal is from a summary judgment of the United States District Court for the Middle District of Pennsylvania entered in favor of the defendant, State Farm Insurance Fire and Casualty Company and State Farm Insurance Companies (State Farm). The court based its judgment on the failure of plaintiffs Fred T. Peno and Patricia L. Peno to pursue their claim within the applicable policy limitations period. We will affirm.

I.

On June 30, 1995, Fred and Patricia Peno purchased a fire insurance policy from State Farm for their residence in Coudersport, Potter County, Pennsylvania. The Policy provided coverage for both the Peno residence and the personal property in it. The policy also contained the following provisions:

> 8. Suit Against Us. No action shall be brought unless there has been compliance with the policy provisions. The action must be started within one year after the date of loss or damage. [hereinafter, the "limitation of suit provision"].[1]
>
> 14. Intentional Acts. If you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and we will not pay you or any other insured for the loss. [hereinafter, the "intentional acts provision"].

On January 9, 1996, a fire occurred at the Penos' residence. Fire companies from Potter County and Tioga county responded to the fire; however, the Peno residence was completely destroyed. On the evening of the fire, State Farm representative Jeff Wilcox

---

[1] Under Pennsylvania law, every fire insurance contract must contain a one year limitation of suit provision. See 40 PA. CONS. STAT. ANN. § 636(2). However, the statute requiring the inclusion of the limitation of suit provision does not in itself create a statute of limitations. See Marshal v. Aetna Cas. & Sur. Co., 643 F.2d 151, 153 (3d Cir. 1981); Lardas v. Underwriters Ins. Co. 231 A.2d 740, 741-42 (Pa. 1962). Rather the one year limitation of suit provision derives its validity and enforceability from the agreement of the parties. See id.

presented a checkfor $2,000 to the Penos. State Farm also continued to provide the Penos with additional living expenses, including rent, up to December of 1996.

On January 10, 1996, Coudersport Fire Chief Timothy P. Haskins, who was in charge of extinguishing the fire at the Penos' residence, went to the Coudersport Pennsylvania State Police Barracks. Haskins informed the police that, although he was unable to discern the cause of the fire, he felt it to be suspicious. Haskins based his suspicion on three facts. First, the owner (Fred Peno) was at home when the fire began. Second, there were no signs of forcible entry. Third, the fire was well underway by the time fire fighters arrived on the scene.

On January 11, 1996, Trooper Troy Greenawald of the Pennsylvania State Police and Carl Mindler, an independent investigator hired by State Farm, conducted an investigation of what remained of the Peno residence. Trooper Greenawald was unable to determine the cause of the fire because weather conditions prevented a thorough examination of the scene; however, he did not rule out that the fire may have been incendiary in nature. Mindler, who took a sample from the supporting beam of the center stairwell, later concluded that the fire was incendiary. Mindler based his conclusion in part upon a laboratory test of the sample performed by a Dr. Dougherty, who informed Mindler that the sample tested positive for gasoline.

On February 21, 1996, the Fire Marshal Division of the Pennsylvania State Police notified State Farm that it had been named as the insurer in a fire loss presently being investigated by the State Police. The February 21, 1996 letter advised State Farm of its obligation, under the Pennsylvania Arson Reporting Immunity Act (the "ARIA"), 40 PA. CONS. STAT. ANN. § 1610.3[2] , to provide the State Police with any relevant policy information or other

---

[2] 40 PA. CONS. STAT. ANN. § 1610.3 provides in relevant part:

(a) Fire loss information. Any authorized agency may, in writing, require any insurance company at interest to release to the requesting authorized agency any or all relevant information or evidence deemed important to the authorized agency which the insurance company may have in its possession relating to a fire loss under investigation by the authorized agency. Relevant information may include, without limitation herein:

(1) pertinent policy information relevant to a fire loss under investigation, including any application for such a policy;

(5) material relating to the investigation of the loss, including statements of any person, proof of loss, and any other information relevant to the

investigatory information relating to the fire loss. Trooper William Dawson of the Pennsylvania State Police, who was assigned to the investigation of the fire, subsequently received a letter dated March 7, 1996 from Craig V. Clark, a State Farm claim superintendent. The March 7, 1996 letter enclosed the fire claim received by State Farm, as required by the ARIA.

On June 5, 1996, Trooper Dawson met with Robert Brunozzi, an independent investigator retained by State Farm, and Ted Marzani, a State Farm claim specialist, for the purpose of reviewing the incident and exchanging information. During the meeting, Brunozzi furnished Trooper Dawson with 26 negative photos which were taken of the scene of the fire by a neighbor. In addition to the photos supplied by Brunozzi, Marzani supplied Trooper Dawson with twenty-three additional items, including a laboratory analysis performed by Dr. Dougherty, an interview with Fred Peno by John Deegan of State Farm, a confidential memo to Marzani from Brunozzi which summarized Brunozzi's investigation, a confidential report prepared by Carl Mindler on behalf of State Farm and numerous financial documents concerning the Penos.

On July 18, 1996, pursuant to the provisions of the ARIA, a meeting took place in Coudersport between Potter County district attorney Jeff Leber, Brunozzi, Marzani, Trooper Dawson, and Scott L. Grenoble, attorney for State Farm. The meeting was held at the request of District Attorney Leber. At the meeting, State Farm's representatives provided Trooper Dawson and District Attorney Leber with additional information produced by State Farm's investigation of the fire, including the personal property inventory form submitted by the Penos and summaries of the examinations under oath of Fred and Patricia Peno.

---

investigation by the authorized agency.

(b) Notification for investigation.

(c)

(1) Whenever the investigation of a fire loss by an insurance company insuring the loss indicates that the probable cause of the fire loss was arson, then the company shall notify, in writing, the appropriate authorized agency and upon the request of any authorized agency, shall provide the requesting authorized agency with such fire loss information developed from the company's inquiry into the fire loss as may be requested by the authorized agency and the insurance company may provide to any authorized agency any information it may have relating to a fire loss[.]

Id.

On October 18, 1996, the State charged Fred Peno with criminal arson. By letter dated December 12, 1996, State Farm denied the Penos' claim for coverage. State Farm based its denial in part upon its belief that Fred Peno had intentionally ignited the fire that destroyed the Peno residence. From September 22 through September 26 of 1997, Fred Peno was tried to a jury, which returned a verdict of not guilty. After the acquittal, Peno sent a letter on October 13, 1997, asking State Farm if it was interested in settling the claim dispute. On October 27, 1997, State Farm replied and stated that it would continue to deny the Peno's claim.

On November 12, 1997, the Penos filed a complaint in the court of common pleas, alleging that State Farm had breached its obligations under the fire insurance policy. On December 11, 1997, State Farm removed the case to the United States district court. Following a pretrial conference, the district court entered an order limiting the subject matter of the parties' initial cross-motions for summary judgment to whether the Penos' claims were barred by the limitation of suit provision in the insurance policy. The district court granted summary judgment in favor of State Farm.

## II.

On appeal, the Penos contend that the district court erred in determining that their claims were time barred. In this connection, the Penos raise four principal arguments. We will address each of their arguments in turn utilizing a plenary standard of review.

The Penos first contend that the limitation of suit provision contained in their fire insurance policy may not be enforced by State Farm because, by invoking the intentional-acts provision of the policy, State Farm voided the entire policy, including the one year limitation of suit provision. In support of this contention, the Penos point to the plain language of their policy, which provides that "if... any person insured under this policy causes ... a loss to property covered under this policy for the purpose of obtaining insurance, then this policy is void." Under the Penos reading of their policy, once State Farm denied coverage on the ground that Fred Peno intentionally caused the loss, the entire policy including the one year limitation of suit provision became void and of no effect.

We disagree. Although the intentional-acts provision voids liability under the fire insurance policy if an insured intentionally causes loss to the insured property, the policy does not give State

Farm the power to unilaterally invoke the provision and void the policy. When State Farm opts not to pay a claim because it believes the insured intentionally caused the loss, it does so at its own peril. If a court later determines that State Farm incorrectly denied coverage, then State Farm will be forced to pay the claim. It may also be liable for a bad faith denial of coverage. The provision simply does not give State Farm the power to unilaterally void an entire policy whenever it believes an insured intentionally caused the loss to his own property.[3]

The Penos next contend that "[s]ince State Farm took an active pursuit and participation in the criminal prosecution of Fred Peno, under the Diamon case, the contractual limitations was estopped, tolled and/or extended until the criminal prosecution was concluded." Again, we disagree. In Diamon, the Pennsylvania superior court held, inter alia, that the insurer's mistaken charge of criminal liability suspended the one year limitation of suit provision contained in the insurance contract. Diamon, 372 A.2d at 1222-23; Leone v. Aetna Cas. & Sur. Co., 599 F.2d 566, 568 (3d Cir. 1979).

But, here, State Farm made no "charge" of criminal liability against Fred Peno. Nor, like the insurer in Daimon, [sic] did State Farm initiate contact with the district attorney which directly resulted in the filing of a criminal complaint against the insured. See Diamon, 372 A.2d at 1221-22. Although State Farm disclosed the findings of its investigation to the authorities, it had no choice but to do so. Under the ARIA, which was enacted after the Diamon decision, an insurer is required to release "to the requesting authorized agency any or all relevant information or evidence deemed important to the authorized agency ... relating to a fire loss under investigation by the authorized agency." 40 PA. CONS. STAT. ANN. §1610.3 We fail to see how State Farm's compliance with this state statutory mandate suspended the one year limitation of suit provision set forth in the policy.

The Penos third argument is that, by providing them with a $2,000 check on the evening of the fire and by continuing to provide them with additional living expenses through December of 1996, State Farm effectively suspended the limitation of suit provision until

---

[3] Moreover, even if we were to accept the Penos' reading of their policy, summary judgment would still be appropriate. If, by invoking the intentional-acts provision, State Farm voided the entire policy, as the Penos suggest, then the Penos would have no policy upon which to base their claims.

it informed the Penos of its decision to deny coverage on December 12, 1996. To support this argument, the Penos principally rely on Samuels v. Blue Cross, 592 A.2d 1310 (Pa. Super. Ct. 1991). However, we think that case distinguishable from the present set of circumstances. In Samuels, the court did hold that "where an insurer provides benefits and later retracts payment, any contractual time limitation is tolled until the date of retraction." Id. at 1311. However, the defendant insurers in that case initially paid for the plaintiff s medical bills without any suggestion that they disputed the validity of those bills or their obligation to pay them. See id. In contrast, State Farm sent the Penos a letter on February 14, 1996 expressly reserving its rights to deny coverage. Thus, even though State Farm provided the Penos with $2,000 on the evening of the fire and continued to provide them with additional living expenses pending investigation of the fire and the Penos' claim, State Farm, by virtue of the February 14 reservation of rights letter, placed the Penos on clear notice that the interim payments were not to be construed as an acceptance of responsibility on the part of State Farm to provide coverage.

The Penos' final argument is that requiring them to have filed their civil suit within the time provided for by the limitation of suit provision would somehow result in a current violation of Fred Peno's constitutional right against self incrimination. Again, however, we disagree. First of all, we note that Fred Peno opted not to invoke his right against self incrimination in the criminal proceeding against him, and, in fact, took the stand in his own defense. Second, we note that if Mr. Peno, had wished to preserve his claim, the proper course would have been to file a civil suit within the applicable limitations period and seek a stay pending the outcome of the criminal proceeding against him.

## III.

Accordingly, we perceive no error in Judge McClure's entry of summary judgment for State Farm. The judgement of the district court, therefore, will be affirmed.

TO THE CLERK:
Please file the foregoing opinion.
/s/ Max Rosenn
Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7605

FRED T. PENO: PATRICIA L, PENO.
Appellants

v.

STATE FARM FIRE AND CASUALTY CO.;
STATE FARM INSURANCE COMPANIES
a/k/a State Farm Insurance.

Appeal from the United States District Court
For the Middle District of Pennsylvania
D.C. Nos.: 97-cv-1859
District Judge: Honorable James F. McClure, Jr.

Before: NYGAARD, RENDELL. and ROSENN. Circuit Judges.

*Argued* December 8. 1999

JUDGMENT

This cause came to be heard *on* the record from the United States District Court for the Middle District of Pennsylvania and was argued on December 8.1999.

After consideration of all contentions raised by the appellant, it is ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against Appellants

/s/_____
Acting Clerk

Dated: December 29, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| FRED T. PENO and PATRICIA L. PENO, | : | No. 4:CV-97-1859 |
| | : | (Judge McClure) |
| Plaintiffs | : | |
| | : | |
| STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM INSURANCE COMPANIES a/k/a STATE FARM INSURANCE, | : | |
| Defendants | : | |

MEMORANDUM
November 19, 1998

**BACKGROUND**

On November 12, 1997, plaintiffs Fred T. and Patricia L.Peno commenced this action with the filing of a complaint to recover the proceeds of a fire insurance policy Their residence and all but a few possessions were destroyed in a fire. At issue is the limitation of time within which plaintiffs could bring an action against defendant State Farm; that is, plaintiffs commenced suit on November 12, 1997, and the date of loss was January 9, 1996 (approximately one year and ten months earlier) Plaintiffs' policy and the law of Pennsylvania provide that any suit to recover the proceeds of a fire insurance policy must be filed within one year of the date of loss.

Before the court is a motion by defendant State Farm for partial summary judgment on the limitation of suit issue (record document no. 17) Plaintiffs have filed a cross motion for partial summary judgment (record document no. 21) on the same issue. For the reasons which follow, we will grant summary judgment in favor of State Farm.

**I. SUMMARY JUDGMENT STANDARD**

Summary judgment is appropriate if the "pleadings,depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (emphasis added).

> . . . [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, arid on which that party will hear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986).

The moving party bears the initial responsibility of stating the basis for its motions and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. He or she can discharge that burden by "showing ... that there is an absence of evidence to support the nonmoving party's case." Celotex at 323, 325.

Issues of fact are genuine "only if a reasonable jury, considering the evidence presented, could find for the nonmoving party." Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). Material facts are those which will affect the outcome of the trial under governing law. Anderson at 248. In determining whether an issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party. White v. Westinghouse Electric Co., 862 F.2d 56, 59 (3d Cir. 1988).

## II. STATEMENT OF UNDISPUTED FACTS

State Farm and the Penos have filed statements of material facts with their respective motions for partial summary judgment (record document nos. 18 and 22). The following statements, set forth in those documents, are those the court deems material and undisputed. (Any changes to the statements are generally stylistic or grammatical, but in some instances reflect the other parties' disagreement or expansion).[1]

1. In 1989, Fred and Patricia Peno purchased the residence in question at R.D. #1, Box 62A, Coudersport, Eulalia Township, Potter County for $80,000.

2. On January 9, 1996, a fire destroyed the Coudersport residence of plaintiffs.

3. Plaintiffs, experts determined that the cause of the fire was an electric short and the failure of the breaker box.

4. On March 7, 1995, Mr. and Mrs. Peno purchased a policy from State Farm, separate from their homeowners policy, policy no. 38-C9-1794-S, for a diamond ring with a value of $11,000.

5. On or about June 30, 1995, Mr. and Mrs. Peno purchased the current fire insurance policy on the residence in question, which was in full force and effect on January 9, 1996, the date of the fire.

6. On the evening of the fire, State Farm representative Jeff Wilcox presented a check for $2,000 to Mr. and Mrs. Peno and thereafter provided the Penos with Additional Living Expenses ("ALE") as provided in the subject insurance policy.

7. Copies of the homeowners policy and the policy for the diamond ring were destroyed in the fire.

---

[1] It should be noted that in contravention to L.R. 56.1 of the Local Rules of the Middle District, plaintiffs have failed to file a response to defendant's statement of material facts. However, since the court is disposing of cross-motions, we will comprise our recitation of undisputed facts based on the materials available to us, i.e. Defendant's Statement of Material Facts, Plaintiffs' Statement of Material Facts, and Defendant's Response to Plaintiffs, Statement of Material Facts.

8. On January 11, 1996, Trooper Troy Greenawald of the Pennsylvania State Police and Carl Mindler, Independent Investigator for State Farm, appeared on the scene and conducted an investigation and inspection of the premises; however, weather conditions impeded the inspection of the fire location.

9. In his police report dated January 20, 1996, Trooper Greenawald opined that the fire may have been incendiary in nature. The police report identified factors to support this opinion, such as: the complete consumption of the second floor; the description of the movement of the fire provided by witnesses; and apparently inconsistent statements given to the State Police by Fred Peno.

10. The Peno residence was a two-story, all-wood structure with two French doors in the middle of the structure and stairs to the second floor immediately inside the doors.

11. The entire premises were completely burned to the ground, with the roof and the second floor completely consumed in fire and collapsing onto the first floor. The only remaining portion of the premises were the four walls around the main area and a small additional laundry area and play room in the northern portion of the premises.

12. While on the premises, Trooper Greenawald and Carl Mindler determined that there was a suspicious burn pattern on the northern second floor portion (2 Id floor playroom), which had not burned and both took samples from that location for further lab analysis.

13. The lab reports for both the State Police and State Farm came back negative for accelerant at this location.

14. The investigators determined that the point of originof the fire was the second floor, southwest corner of the structure.

15. Carl Mindler took a sample from the supporting beam of the center stairwell.

16. Trooper Greenawald stated that he did not suspect anything unusual at the supporting beam of the center stairwell.

17. The aforementioned sample was sent to Dr. Dougherty, who was hired on behalf of State Farm, and was determined to be positive for gasoline.

18. Dana Hemphill, one of the neighbor firemen, testified that he did not smell accelerant on Mr. Peno, and that he only saw the fire on the second floor when he entered the residence.

19. Ronald Tomb, a stranger, testified that he ran into the house as it was on fire, and was told by Mr. Peno that Mr. Peno was trying to dial 9-1-1.

20. Two neighbors actually did call 9-1-1 to report the fire.

21. Several fire companies from Potter County and Tioga County responded to the fire, under the direction of Coudersport Fire Chief Timothy P. Haskins.

22. At Mr. Peno's trial for the arson charge, the defense was permitted to perform a demonstration in which a recording resulted by dialing 7-1-1 or 8-1-1.

23. Daniel Saulter stated that he saw Fred Peno run across the street to a neighbor's house. Mr. Saulter entered the house with Mr. Peno through the garage area. Mr. Saulter did not smell any accelerant on Mr. Peno or in the house.

24. State Farm Investigator Carl Mindler made a determination that the fire was of "incendiary" origin.

25. According to the Police Report of Trooper Williams L. Dawson, on March 31, 1996, he received a letter from Craig V. Clark, SIU Claim Superintendent for State Farm, addressed to Captain John Mitchell of the Pennsylvania State Police, which stated "our investigation into this fire loss indicates that the probable cause of the fire was arson."

26. The aforementioned letter was apparently in response to a letter sent to State Farm by the State Fire Marshal on February 21, 1996.

27. On February 21, 1996, the Fire Marshal Division of the Pennsylvania State Police notified State Farm that State Farm had been named as the insurer in a fire loss presently being investigated by the State Police.

28. The February 21, 1996, letter advised State Farm of its obligation to provide the State Police with any relevant policy information or other information relating to the fire loss, in accordance with the Pennsylvania Arson Reporting Immunity Act.

29. In his fire incident report dated January 9, 1996, Chief Haskins reported that when fire fighters arrived at the fire

scene, the fire was in the stairway of the structure and appeared to be burning down the face of the stairs. The fire spread quickly and "flashed over" the attack crew at the top of the stairway.

30. According to the Pennsylvania State Police Incident Report dated January 20, 1996, Chief Haskins appeared at the Coudersport Barracks of the Pennsylvania State Police on January 10, 1996, to inform the State Police Fire Marshal for Potter County that in his opinion, the fire at the Peno residence was "suspicious" in origin.

31. A sworn statement and proof of loss were filed with State Farm on May 13, 1996.

32. According to the State Police Report, on May 8, 1996, Trooper William L. Dawson discussed the case with State Farm Investigator Ted Marzani, who phoned him and advised him that the Penos would be giving depositions on May 10, 1996, in Williamsport, Pennsylvania.

33. Carl Mindler's Cause and Origin Report indicates that the fire's propagation rate was possibly enhanced by a flammable liquid; at the time the report was issued, there was no definitive determination that accelerants were present at the fire locations.

34. Trooper Dawson met with State Farm representatives, Robert Brunozzi and Ted Marzani, on June 5, 1996, in Coudersport, for the purpose of reviewing this incident and exchanging information.

35. After the meeting, Trooper Dawson changed his determination of the subject fire from "undetermined" to "arson."

36. Mr. Brunozzi furnished Trooper Dawson with 26 negatives of photos which were taken of the scene of the fire by Marcia LaGrua, a neighbor.

37. In addition to the photo negatives that were supplied, Mr. Marzani supplied 23 additional items to Trooper Dawson as listed in his report, including, but not limited to, the laboratory analysis of Dr. Dougherty, an interview with Fred

Peno by John Deegan of State Farm, a confidential memo to Ted Marzani from Robert Brunozzi which was a synopsis of pages 5 through 19 of his investigation, a confidential report prepared by Carl Mindler on behalf of State Farm, numerous financial documents concerning the Penos and various other documents.

38. In his report of June 27, 1996, Trooper Dawson received a complete copy of the Cause and Origin Report of Carl H. Mindler, as well as 26 ten-inch color photos.

39. On July 18, 1996, pursuant to the provisions of the Arson Immunity Reporting Act, a meeting took place in Coudersport with Potter County District Attorney Jeff Leber, Robert Brunozzi, Ted Marzani, Trooper Dawson, and Scott L. Grenoble, attorney for State Farm. As the result of the investigations performed by the Pennsylvania State Police, Fred Peno was charged with criminal arson.

40. This meeting was called at the request of District Attorney Leber.

41. On October 22, 1996, Fred Peno was arrested and charged with arson.

42. A preliminary hearing on those charges was held before District Justice Tasillo on November 22, 1996.

43. District Justice Tasillo found that the Commonwealth had established a prima facie case on all the offenses alleged in the criminal complaint and bound Fred Peno over for trial in Potter County on all charges.

44. On September 16, 1996, State Farm advised Mr. and Mrs. Peno that they were concluding their investigation.

45. On September 24, 1996, State Farm sent a rent check in the amount of $300 to the Penos.

46. On October 31, 1996, a copy of the insurance policy was requested from Brad Charles, Esquire, by Lee H. Roberts.

47. On November 6, 1996, a copy of the insurance policy was requested from Ted Marzani by Lee H. Roberts.

48. On November 11, 1996, a second request was made to Ted Marzani for a copy of the insurance policy and endorsement page by Lee H. Roberts.

49. By letter dated November 15, 1996, and received on November 18, 1996, the Penos received a copy of the fire insurance policy (not the ring policy), without the declaration sheet stating the actual coverage.

50. On November 19, 1996, Lee H. Roberts made another request for the declaration sheet to Brad Charles.

51. By letter dated December 12, 1996, and signed by Craig V. Clark, State Farm denied the Penos' claim due to, but not limited to, the intentional ignition of the fire and the intentional misrepresentations made by the Penos to State Farm.

52. On December 12, 1996, a copy of a generic policy (Form 5) was received from Brad Charles with the statement, "I will have to confirm that this is the actual policy issued to Mr. and Mrs. Peno. I will also have to make sure there are no endorsements to this policy. I will confirm each-of these things."

53. The Penos' homeowners insurance policy contained a one year "limitation of suit" provision, as mandated by 40 PA.C.S.A. § 636.

54. The declaration sheet was not included in the letterDecember 12, 1996, with the policy. See no. 51, supra.

55. On December 27, 1996, a request was made to Jeff Wilcox for a copy of the amount of insurance.

56. On January 8, 1997, a copy of the declaration sheet for the fire insurance policy and the ring policy was received for the first time by plaintiffs, counsel.

57. On January 10, 1997, a request was made to Brad Charles for a copy of the ring policy or the endorsement involving the ring.

58. After the jury verdict on September 26, 1997, acquitting Fred Peno of all charges, a letter was sent on October 13, 1997, asking Brad Charles if State Farm was interested in settling the matter.

59. The same request was sent on October 21, 1997, to Ted Marzani and John Deegan.

60. On October 27, 1997, a letter was received from Brad Charles acknowledging Fred Peno's acquittal of the criminal arson charges, and State Farm's denial of the Penos, claim.

61. The Penos filed suit against State Farm on November 12, 1997.

62. The Peno residence was sold by Article of Agreement on December 23, 1995, to Charles J. and Jennifer J. Raptis for $200,000.

63. According to the Agreement (see no. 57, supra), if the premises were partially destroyed or completely destroyed by fire, it was the option of Charles Raptis to take the insurance proceeds and the premises in its then condition or to terminate the purchase agreement.

64. The valuation of the ring was $11,000 as determined by an appraisal made both before and after the fire.

65. As of the date of the fire, Fred Peno had liquid assets in the amount of $248,448 and total assets of $519,918.

66. The State Farm fire report of January 18, 1996, stated that the cause of the fire was unknown and that State Farm form "3" was the policy in effect.

67. In the criminal case, District Attorney Jeff Leber attempted to compel Fred Peno to make the electric box available for further inspection and Judge Leete ruled that this was not required.

**DISCUSSION:**

## III. LIMITATION OF SUIT PROVISION

State Farm's position is that the Penos' complaint is timebarred because of the one-year limitation of suit provision contained in the homeowners policy. We agree with State Farm, and, for the reasons which follow, will grant summary judgment in its favor.

The Penos' homeowners policy which is the subject of this litigation contains the following limitation of suit provision:

> 8. Suit Against Us. No action shall be brought unless there has been compliance with the policy provisions. The action must be started within one year after the date of loss or damage.

See Certified Copy of Homeowners Policy, State Farm's Motion for Partial Summary Judgment, at Exhibit 21 (emphasis added). This one-year limitation of suit clause is mandated by Pennsylvania law. See 40 PA.C.S.A. § 636. As such, the limitation is valid and reasonable. Schreiber v. Pa. Lumberman's Mutual Ins. Co., 444 A.2d 647, 649 (Pa. 1982).

40 PA. CON. STAT. ANN. § 636 provides as follows:

> 157. Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

40 PA. CON. STAT. ANN. § 636. Moreover, Pennsylvania law recognizes the proposition that the limitations period begins to run on the date of the destructive event, regardless of the date the loss is actually discovered. See Duffy v. Allstate Ins.Co., No. CIV.A.97-6668, 1998 WL 470156, at *2 (E.D.Pa. Aug. 11,1998)(citing General State Auth. v. Planet Ins. Co., 346 A.2d 265, 267-68 (Pa. 1975)).

Therefore, in order for the Penos' claim against State Farm to be considered timely, they must have filed their action against State Farm within one year of the date of the fire. Here, the relevant dates are as follows:

1. **June 30, 1995** - The Penos purchase subject insurance policy from State Farm.

2. **January 9, 1996** - Date of fire.

3. **January 9, 1996** - Date of payment of $2,000 from State Farm to the Penos; State Farm makes Additional Living Expenses ("ALE") payments thereafter, as provided in the policy.[2]

4. **May 13, 1996** - Sworn statement and proof of loss filed with State Farm.

5. **September 16, 1996** - State Farm concludes investigation.

6. **October 22, 1996** -- Fred Peno arrested and charged with criminal arson.

7. **November 22, 1996** -- Fred Peno's preliminary hearing before District Justice Tasillo; Fred Peno bound over for trial on all charges.

8. **December 12, 1996** -- State Farm denies coverage for the Penos' fire loss claim.

9. **September 26, 1997**--Jury acquits Fred Peno of all charges.

10. **November 12, 1997**--The Penos file this action against State Farm.

Thus, as this recitation of relevant dates indicates, the Penos filed their claim approximately one year and ten months after the time period allowed by the limitation of suit provision. There is no dispute that the date of the fire was January 9, 1996, and the date the

---

[2] It is in dispute as to when the final ALE payment was made. Plaintiffs contend that State Farm made ALE payments until December 31, 1996. See Plaintiffs' Statement of Material Facts at 6. State Farm contends that they only made ALE payments until their investigation determined the cause of the fire to be arson. See Defendant's Response to Plaintiffs' Statement of Material Facts at 6. However, we do not believe that this dispute is material to the disposition of these motions, and we will note here that there is no date certain as to when the ALE payments ceased.

Penos commenced this action was November 12, 1997. In light of this fact alone, Pennsylvania law would dictate that summary judgment be granted in favor of State Farm. However, plaintiffs set forth a number of arguments seeking to render the limitation of suit provision a nullity, thereby making their complaint against State Farm timely. We will now examine seriatim each of plaintiffs, arguments.

**1. Waiver or Estoppel**

The limitation of suit provision can be disregarded only when the conduct of the insurer constitutes a waiver or estoppel. See Petraglia v. Am. Motorists Ins. Co., 424 A.2d 1360 (Pa. Super. 1981), aff'd. 444 A.2d 653 (Pa. 1982). "Waiver is an express decision by the insurer not to rely on the suit limitation clause. [Citations omitted]. Estoppel, on the other hand, refers to acts by the insurer which excuse the insured's failure to act timely." Duffy 1998 WL 470156 at *2 (citing Jackson v. Chubb Group of Ins. Cos., No. 85-3466, 1987 WL 8556, at *3 (E.D.Pa. Mar. 26, 1987)).

Here, plaintiffs contend that State Farm's act of making payments, specifically the ALE payments, tolled the limitations period from January 9, 1996 (the day of the fire) to January 1, 1997 (the day after plaintiffs allege to have received their final ALE payment). See Plaintiffs' Memorandum of Law in Support of Plaintiffs' Cross Motion for Partial Summary Judgment Filed by Defendant, State Farm at 4. We disagree with plaintiffs' contention that State Farm's actions amount to a waiver of the limitation of suit provision. To the contrary, we believe that State Farm's payment of $2,000 to the Penos on the night of the fire, and the ALE payments during the pendency of the investigation, were based on a contractual requirement and did not constitute a waiver of any possible defenses State Farm may have chosen to assert at a later date. Indeed, State Farm went to the Peno residence on the night of the fire and presented them with a $2,000 check to cover living expenses. Clearly, State Farm did not have any opportunity whatsoever to investigate the nature of the Penos, claim at that time. Rather, State Farm provided the Penos with payments to cover living expenses in accordance with its contractual obligation. See Certified Copy of Homeowners Policy.

Moreover, the homeowners policy clearly sets forth State Farm's position regarding intentional acts. The policy provides as follows:

14. **Intentional Acts.** If you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits; then this policy is void and we will not pay you or any other **insured** for this loss.

Id. at 13 (emphasis in original). Thus, because State Farm's investigation determined that the fire was incendiary in nature, its decision to deny the Penos' claim was in accordance with the homeowners policy. We believe that State Farm's obligation to provide ALE payments was separate and distinct from its obligation to make payments for the actual loss. Thus, we find the fact that State Farm made ALE payments to the Penos to have no tolling effect on the limitations of suit provision.

**B. Notice Provision vs. Limitation of Suit Provision**

The Penos cite Brakeman v. Potomac Ins. Co., 371 A.2d 193 (Pa. 1977), for the proposition that in order for an insurance company to use the notice provision as a bar to an insured's recovery, an insurance company must prove that: (1) the insured breached the notice provision, and (2) that the insurance company suffered prejudice as a result. Brakeman, 371 A.2d at 196. The reason for the court's holding was two-fold: First, the court reasoned that departing from a strict contractual approach was appropriate since notice provisions are seldom subject to negotiation. Rather, "[t]he only aspect of the contract over which the insured can 'bargain' is the monetary amount of coverage." Id. Thus, an insurer may not deny a claim "unless a sound reason exists for doing so." Id. at 197.

Second, the court in Brakeman reasoned that the purpose of a notice provision was "to give the insurer an opportunity to acquire, through adequate investigation, full information about the circumstances of the case, on the basis of which, it can proceed to disposition, either through settlement or defense of the claim." Brakeman, 371 A.2d at 197 (citations omitted). Further, "the function of a notice requirement is to protect the insurance company's interests from being prejudiced." Id.

Although their argument is unclear in their brief, the Penos seem to contend that State Farm has not proven that it suffered any prejudice as a result of the Penos, filing of this action more than one

year after expiration of the limitation of suit provision. See Plaintiff's Memorandum of Law at 11. Although at issue here is the limitation of suit provision rather than the notice provision, the Penos contend that the rationale found in Brakeman is applicable. In support of this argument, the Penos also cite ACF Produce, Inc. v. Chubb/Pacific Indem. Group, 451 F. Supp. 1095 (E.D. Pa. 1978), in which the court held that an insurer must show prejudice before it can compel forfeiture by invoking a proof of loss or limitation of suit clause.

We disagree with the Penos' contention that State Farm had to prove it was prejudiced by the Penos, untimely filing of the complaint in this action, and that State Farm failed to do so. We find guidance from the Third Circuit in Hospital Support Services [HSS] v. Kemper Group, 889 F.2d 1311 (3d Cir. 1989), in which the court addressed the issue of "whether the rationale of Brakeman should apply to the limitation of suit clauses as well as to notice of loss provisions." HSS, 889 F.2d at 1313. HSS involved a claim for four failed x-ray tubes which was not commenced within one year of the alleged loss as required by the insurance policy. Id. at 1312.

The Third Circuit recognized that several Pennsylvania courts were reluctant to apply Brakeman to limitation of suit clauses where state statutes mandated the inclusion of such clauses in insurance policies. Id. at 1314 (citing Laughton v. Chester County Ins. Co., 641 F. Supp. 40 (E.D. Pa. 1985); Esbrandt v. Provident Life & Accident Ins. Co., 559 F. Supp. 23 (E.D. Pa. 1983), aff'd, 772 F.2d 731 (3d Cir. 1983); Schreiber v. Pa. Lumberman's Mut. Ins., 444 A.2d 647 (1982)). Moreover,"with regard to the prejudice requirement being based on the purpose of the notice of loss provision, other courts have held that the reasoning supportive of the Brakeman 'notice, rule should not extend to limitation of suit clauses, and that Brakeman, therefore, does not apply to limitation of suit clauses." Id. (citing Brandywine One Hundred Corp. v. Hartford Fire Ins. Co., 405 F. Supp. 147 (D. Del. 1975), aff'd, 588 F.2d 819 (3d Cir. 1978)). Thus, the Third Circuit in HSS held that, under Pennsylvania law, an insurer need not show prejudice to enforce a contractual limitation of suit provision, even when the clause is not mandated by state law.

However, the homeowners policy in our case did include a statutorily mandated limitation of suit provision. Thus, the Pennsylvania Supreme Court decision in Schreiber controls. In that case, the Schreibers (the insureds) filed suit more than two years after their alleged fire loss. Their insurance policy contained a

statutory one-year limitation of suit provision; therefore, the Schreibers, claim was considered time-barred. The Schreibers contended that the one-year limitation of suit provision contained in their fire insurance policy was not a bar to filing suit more than two years after their alleged loss unless the insurance company could show it was prejudiced by their delay. Id. at 648.

The Pennsylvania Supreme Court held that the rationale of Brakeman was inapplicable since here, the limitation of suit provision was a statutory mandate, whereas in Brakeman, the limitation of suit provision was included in the policy by the choice of the insurer. Id. The Pennsylvania Supreme Court further stated:

> We have recognized that in certain circumstances, a limitation of suit provision will not be permitted to bar a delayed suit: `a provision of this nature may be extended or waived where the actions of the insurer lead the insured to believe the contractual limitation will not be enforced.'

Id. at 649 (citations omitted).

with this in mind, we find no actions of State Farm which could have led the Penos to believe that the contractual limitation would not be enforced. There is no basis in the record for a jury to infer otherwise. In fact, when State Farm alerted the Penos in writing on December 12, 1996, that it was denying coverage for their alleged loss, the Penos should have immediately filed a writ or complaint with the court in order to maintain the timeliness of their action. Indeed, it was only about a month prior to State Farm's denial of coverage that Fred Peno's preliminary hearing was held before District Justice Tasillo and he was bound over for trial on all charges.

Accordingly, we apply the substantive law of Pennsylvania as set forth by the Pennsylvania Supreme Court in Schreiber and Petraglia and hold that State Farm need not have shown that it was prejudiced as a result of the Penos' violation of the limitation of suit provision, and find no basis in the record for a jury to infer that any actions of State Farm induced the Penos into thinking that the limitations provision would not be enforced.

**C. State Farm's Investigation**

The Penos also contend that State Farm's investigation into the cause of the fire, and its cooperation with the State Police in prosecuting Fred Peno for criminal arson, tolled the limitation of suit provision. See Plaintiffs, Memorandum of Law at 7. The Penos contend that Diamon v. Penn Mutual Fire Ins. Co., 372 A.2d 1218 (Pa. Super. 1977), is controlling here. In that case, the court held that where an insurer induces criminal arson charges against its insured, the one-year limitation of suit provision is suspended. Diamon, 372 A.2d at 1222. Furthermore, the court in Diamon held that where the insurer makes a mistaken charge against the insured, the limitation period is suspended. Id. at 1223.

We do not believe that Diamon is controlling. First, in our case, there was no "mistaken charge" filed against Fred Peno. While we recognize that Fred Peno was acquitted by a jury of all criminal arson charges, the fact remains that early investigations by the police, fire marshal, and other experts found the fire to be incendiary in nature. We previously stated some of the factors that were found to support this conclusion, such as the total consumption of the second floor, the description of the movement of the fire, the presence of an accelerant, and Fred Peno's inconsistent statements. See Statement of Undisputed Facts, supra, at 1 9, 16. Moreover, the burden in a criminal case is proof beyond a reasonable doubt. Such a standard applied in an arson case makes prosecuting a case such as this extremely difficult, given the nature of the crime involved. Therefore, we find Fred Peno's acquittal to have no bearing on State Farm's conclusion that the fire was intentionally ignited by the insured as well as its subsequent decision to deny the Penos, claim in accordance with the provisions set forth in the homeowners policy.

Moreover, we agree with State Farm that the fact that Diamon was decided before the promulgation of the Arson Reporting Immunity Act is of great import to the outcome of our case. This act provides as follows:

> **(a) Fire loss information.**--Any authorized agency may, in writing, require any insurance company at interest to release to the requesting authorized agency any or all relevant information or evidence deemed important to the authorized agency which the insurance company may have in its possession relating to a fire loss under investigation by the authorized agency. Relevant information may include, without limitation herein:

(1) pertinent policy information relevant to a fire loss under investigation, including any application for such a policy;

(2) underwriting information- or risk inspection reports;

(3) policy premium payment records which are available;

(4) history of previous claims made by the insured; and

(5) material relating to the investigation of the loss, including statements of any person, proof of loss, and any other information relevant to the investigation by the authorized agency.

**(b) Notification for investigation.**

(1) Whenever the investigation of a fire loss by an insurance company insuring the loss indicates that the probable cause of the fire loss was arson, then the company shall notify, in writing, the appropriate authorized agency and upon the request of any authorized agency, shall provide the requesting authorized agency with such fire loss information developed from the company's inquiry into the fire loss as may be requested by the authorized agency and the insurance company may provide to any authorized agency any information it may have relating to a fire loss[.]

40 PA. CONS. STAT. ANN. § 1610.3 (emphasis added)

Indeed, this act places upon insurance companies the affirmative duty to supply the appropriate authorized agency with information regarding losses due to suspected arson. The State Police notified State Farm in writing of its duties under the act. See Statement of Undisputed Facts at ¶¶ 26-27. Thus, State Farm fulfilled its duty in accordance with the act by supplying information to the State Police and cooperating with the District Attorney's office.

We hold that State Farm's actions in accordance with the Arson Reporting Immunity Act do not toll the one-year limitations period.

**D. The Penos' Remaining Arguments**

The Penos assert some remaining arguments that we find to be without merit. The Penos contend that they did not file a writ or summons within the limitation of suit period because the filing of a writ would have given State Farm an absolute right within twenty days to demand a complaint and to seek discovery. See Plaintiffs' Memorandum of Law at 15-16.

The Penos also assert that because the limitation of suit provision was small and ambiguous in its print, the six-year statute of limitations should apply here. We believe this argument is without merit. As previously stated, the one-year limitation of suit provision is a statutory mandate. Moreover, we find no ambiguity in the statement, "The action must be started within one year after the date of loss or damage." The language is plain on its face, and this court will not entertain any argument from the Penos that the policy does not contain the words "limitation of suit."

**CONCLUSION:**

Based on the foregoing, we conclude that the Penos' claim against State Farm is time-barred due to the statutory one-year limitation of suit provision stated in the subject homeowners policy. Therefore, we will grant summary judgment in favor of State Farm and deny the Penos' cross-motion.

An order consistent with this memorandum will issue.

/s/
James P. McClure, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| FRED T. PENO and PATRICIA L. PENO,<br><br>Plaintiffs<br><br>STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM INSURANCE COMPANIES a/k/a STATE FARM INSURANCE,<br><br>Defendants | : | No. 4:CV-97-1859<br>(Judge McClure) |

**ORDER**

**November 19, 1998**

For the reasons stated in the accompanying memorandum, IT IS ORDERED THAT:

1. The motion for partial summary judgment (record document no. 17) filed by defendant State Farm is granted.

2. The motion for partial summary judgment (record document no. 21) filed by plaintiffs Fred and Patricia Peno is denied.

3. The clerk is directed to enter final judgment in favor of defendant and against plaintiffs.

4. The clerk is directed to close the file.

/s/
James F. McClure, Jr.
United States District Judge

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

Nos. 98-7605

---

FRED T. PENO; PATRICIA L. PENO,

Appellants

v.

STATE FARM FIRE AND CASUALTY COMPANY;
STATE FARM INSURANCE COMPANIES;
a/k/a State Farm Insurance,

---

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 97-cv-1859)

---

SUR PETITION FOR REHEARING

---

BEFORE: BECKER, Chief Judge,
SLOVITER, MANSMANN, GREENBERG, SCIRICA,
NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY and
ROSENN*, Circuit Judges

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of the this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court in banc the petition for hearing is hereby DENIED.

By the Court,

Circuit Judge

*Vote limited to panel rehearing only.
Dated: **JAN 28 2000**